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SAINT LOUIS, DECEMBER 20, 1878.

CURRENT TOPICS.

THE question of the survival of causes of action came before the English Court of Appeal the other day, in the case of *Twycross v. Grant*, 27 W. R. 87. An action had been brought to recover money paid by the plaintiff for shares which he had been induced to take by the fraudulent misrepresentations of the defendant. He had obtained a verdict, but died pending an appeal. The court below ordered the substitution of his administratrix as a party to the action, from which ruling the defendant appealed. It was argued on his behalf that the action being for fraudulent representations was a personal one, and came under the rule of common law, *actio personalis moritur cum persona*, and could not, therefore, survive to the executrix or the administratrix. It did not come, it was contended, under the statute 4 Edw. 3, c. 5, which enacted that executors should have an action of trespass for goods and chattels of the testator carried away in his life-time, in like manner as the testator would have had if living. The case of Peek v. Gurney, 22 W. R. 29, L. R. 6 H. L. 377, showed that an action for fraudulent misrepresentation was the same as an action for deceit; and though the executor might have an action, he must allege special damage to the estate on the pleadings which in this case did not appear. Chamberlain v. Williamson, 2 M. & S. BRAMWELL, L. J.—This appeal must be dismissed. No doubt at common law personal actions did not survive. But the statute of Edward III had been construed by successive decisions to extend to all actions except those relating to the freehold, or those affecting the person or reputation of the plaintiff only, such as assault, slander, breach of promise of marriage, etc. The statute 3 and 4 Will. 4, c. 42, gives a similar right in respect of actions for injury to a man's real estate, and it may be inferred that the personal estate was already protected. It is not necessary to allege special damage; it is sufficient if it appear that the wrong was such as caused damage to the estate as opposed to the person of the deceased. BRETT, L. J.—In any action on contract or tort, where it is shown on the face of the proceedings that injury has been done to the estate of the deceased, the action is maintainable by the executor.

In *Isaacs v. Abraham*, decided in the United States Circuit Court for the District of Massachusetts, it was held that though a client may change his solicitor whenever he pleases, subject to the solicitor's lien, the lien does not enable the solicitor to stay or delay the proceedings in the suit. The substitution of solicitors in equity is made on motion, but the motion is one which is granted as a matter of course, subject to the lien of the former solicitors. That lien, however, does not extend so far as to enable the solicitor to stay or delay the proceedings. Merrewether v. Mellish, 13 Ves. 161; Twist v. Dayrell, 13 Ves. 195. In Odea v. Odea, 1 Sch. & Lef. 315, Lord Redesdale said: "I can not do this. It is not in my power. I never heard of such a practice before. A solicitor has advantages for the recovery of what is due him for costs, which men in other situations have not, by keeping his client's papers, but he has no right to stop the cause from proceeding." And in Commerell v. Poynton, 1 Swanst. 1, Lord Eldon says: "A solicitor can not, by virtue of his lien, prevent the king's subjects from obtaining justice. In such a case as this there is undoubtedly this hardship on the solicitors, that their lien upon the papers and upon the decree may be an inadequate security, because the litigation in patent causes has become very expensive, and the decree often is valuable more from its establishing a title, which may be enforced throughout the country, or, rather, which is likely to be respected throughout the country, than from the damages which can be recovered in the particular case. This may be regretted, but can not change the rule of law." At one time there appears to have been a distinction taken in England between the case of a client changing his solicitor, and that of a solicitor relinquishing the conduct of the cause. The distinction is not now very material, but so far as there is any, the solicitor's rights are somewhat less in the latter case, and it is considered that the solicitor gives up the cause, if he re-

fuses to proceed, even though he would fully be justified in so doing, by the refusal of his clients to advance or to pay his proper disbursements and charges. The cases of Sloo v. Law, 4 Blatchf. 268; Supervisors v. Broadhead, 44 How Pr. 417, and The Oneiza, 4 Ad. & E. 36, in which the substitution of attorneys or solicitors without payment of fees was refused, are not inconsistent with these views. In one of them there was a fund in court, on which the solicitor had a lien, and the order was that he be paid out of that fund simultaneously with his discharge. In another there appears to have been no question about the cause proceeding, but whether the solicitor should be obliged to deliver up the papers in his hands on which he had an uudoubted lien. Supervisors v. Broadhead arose under a rule of court which provided that a change of attorneys should not be made without the order of a justice, and the client in that case being a public body which could not be sued by attorney, the court thought it right, under the circumstances of that case, to order that the fees be paid. In a very similar case in the Supreme Court of the United States, the State of Texas was the client in which the court ordered such a substitution, and said that a party could change his solicitor whenever he pleased, subject to his lien. *Re* Paschal, 10 Wall. 483.

In *Day v. Connecticut General Life Insurance Co.*, recently decided by the Supreme Court of Errors of Connecticut, the tender of a premium on a life insurance policy was refused on the ground that the condition regarding intemperance had been violated. Suit was thereupon brought by the plaintiff's assignee to recover the premiums paid with interest, upon an implied promise to receive the premiums and keep the policy in force. The policy contained no other express promise except to pay the amount on the death of the insured. The court held that the action could not be maintained. "It would seem" said the court "that a person situated as the plaintiff was, may choose between two remedies. 1. He may elect to consider the policy at an end; in which case, with a declaration containing proper averments, he may recover the equitable and just value of the policy. He ought not to recover more, as the policy was terminated by mutual consent; and it does not seem to be a case where either party ought to be subjected to penal consequences. Of course such a case should depend upon the question whether the policy was rightfully declared forfeited. If it was, the plaintiff cannot recover; if it was not, he will recover the full value of the policy. 2. If he desires that the policy shall continue, he may institute a proceeding to have the policy adjudged to be in force, in which case the question of forfeiture may be determined. In that case the rights of the parties will be determined in a reasonable time, the parties will be relieved of suspense, and if it is decided against the forfeiture, both parties will have what they originally contracted for. Perhaps a third course is open to him; and that is to tender the premium, and if refused, wait until the policy by its terms becomes payable, and then test the forfeiture in a proper action on the policy. This course may involve delay for a long series of years, during which both parties will be in uncertainty as to their legal rights, and it will be attended with this further disadvantage, that both parties may find it difficult to obtain proper proof. The plaintiff in this case pursued an entirely different course. He did not wait for the policy to become a claim—he did not resort to a court of equity to have the policy established, and he did not elect to consider the policy at an end. But he brought a suit on an alleged implied promise, and seeks to recover the full amount of the premiums paid, leaving the question of the defendant's liability on the express promise contained in the policy an open one." In Hoschster v. De La Tour, 20 E. L. & E. 157, the defendant agreed to employ the plaintiff as a courier, to commence at a certain day. Before the time arrived the defendant repudiated the contract, and declared he would not perform it. It was held that the plaintiff might treat that as a breach, and sue as for a breach of the contract before the time appointed for it to commence. Frost v. Knight, L. R. 7 Ex. 111 was an action on a promise to marry on the death of the defendant's father. While the father was yet living the defendant broke off the engagement. It was held that an action would lie immediately. These are leading cases on the subject of

maintaining actions on promises before the time arrives for their performance. They have been followed by some of the American courts. In Butis v. Thompson, 42 N. Y. 246, they were apparently followed; but in Freer v. Denton, 61 N. Y. 492, a majority of the court of commissioners hesitated, and it may be regarded as an open question in that state. In Dugan v. Anderson, 36 Md. 567, the question was discussed, but not decided. In Massachusetts they have been rejected, and the soundness of the principle upon which they rest questioned. Daniels v. Newton, 114 Mass. 530. See, also, as to the determination of contracts of insurance by refusal to receive premiums: McKee v. Phœnix Ins. Co., 28 Mo. 383; Howland v. Continental Ins. Co., 121 Mass. 499; McAllister v. N. E. Mut. Co., 101 Mass. 558; Haynes v. American Popular Ins. Co., 69 N. Y. 435; Cohen v New York Mut. Life Ins. Co., 50 N. Y. 610.

EXECUTIONS AGAINST TRUST FUNDS AND ANNUITIES.

There are statutes, regulating proceedings in aid of executions at law, which provide that funds held in trust for the debtor, where the trust has been created by, or the fund has proceeded from, some person other than the debtor, shall not be subject to their operation.[1] As where a devise is made to a trustee of a sum certain, to be invested, and the interest collected semi-annually, and paid over to a female as long as she shall remain unmarried.[2] New York, while having a similar statute (as shown in the note below), has another which provides that, "where a trust is created to receive the rents and profits of lands, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum which may be necessary for the education and support of the person for whose benefit the trust is created, shall be liable, in equity, to the claims of the creditors of such person, in the same manner as other property which can not be reached by an execution at law."[3] A trust fund created by another person for the benefit of the debtor is *inalienable*,[4] and can not be reached by a creditor's bill in advance; that is, before the installments fall due; nor until they pass to an assignee under the insolvent laws.[5] The object of the statute last quoted is said to be to prevent the accumulation of the surplus interest or income not wanted for the support of the *cestui que trust*, where no valid direction for such accumulation has been given, by making such surplus liable to the claims of his creditors.[6] Accordingly, where an express trust is created to receive the interest or income of trust property, and to apply it to the use of a person, from time to time, the surplus, beyond what is necessary for his support and maintenance, may be reached by a creditor's bill against him, after such interest or income has become due.[7] In determining what is necessary for a debtor's education and support, under the foregoing statute, it is immaterial whether or not the debtor is in good health or able to earn a livelihood.[8] Nor can the motive of the person creating the trust be enquired into by creditors of the *cestui que trust;* since, if the trust is good, the fund which they are seeking to subject belongs, not to their debtor, but to the person creating the trust, or his heirs, or residuary legatees.[9] But in determining what the *cestui que trust* needs for his support, it is conceded that a person brought up in idle and dissolute habits, who has never learned how to take care of himself or his property, will need more than one who has been decently raised; and creditors must learn not to trust such a person.[10]

The foregoing statute of New York was designed to put at rest a question which, prior to its adoption, remained unsettled in that

(1.) N. J. Act of April 12, 1864, R. S. N. J., 1874, p. 29, § 24. The words of this statute important in this connection are: "Where the trust has been created by, or the fund held in trust has proceeded from him"2 —that is, from the debtor. New York has a similar statute, the language being: "Except where such trust has been created by, or the fund so held in trust has proceeded from some person other than the defendant himself." 2 R. S. 174, § 28.

(2.) Frazier v. Barnum, 19 N. J. Eq. 318.

(3.) 1 R. S. N. Y., p. 729, § 57.

(4.) Hawley v. James, 16 Wend. 118, 165.

(5.) Clute v. Bool, 18 Paige, 82.

(6.) Clute v. Bool, *supra*. per Walworth Chan. This view of the statute was doubted by Wright, J., in Campbell v. Foster, 35 N. Y. 361; but the question was passed over; but the rule seems to have been thought sound by Hogeboom, J., in Graff v. Bonnett, 31 N. Y. 14. To the same effect, see Degraw v. Clason, 11 Paige, 140, 141; Bramhall v. Ferris, 14 N. Y. 41.

(7.) Ibid. Sillick v. Mason, 2 Barb. Chan. 79.

(8.) Chute v. Bool, *supra*.

(9.) Ibid.

(10.) Sillick v. Mason, *supra;* Walworth, Chan.

state;[11] but it gave rise to a line of decisions not always uniform, and sometimes confusing. But the cases appear to unite upon one test by which to determine whether, under it, a fund held in trust for a debtor may be subjected to the satisfaction of the demands of his creditors, namely, the test of alienability. If the interest is alienable by the debtor—that is, if it is of such a nature that he can sell or dispose of it, or control it as he pleases, then it is such an interest as will be accessable to the claims of creditors. It will pass to his assignee in bankruptcy, and can be reached by a proceeding in equity. But if it is an interest which the *cestui que trust*, the debtor, is inhibited from aliening, then the contrary result will follow.[12] In New York this question was governed by the following statute: "No person beneficially interested in a trust, for the receipt of the rents and profits of *land*, can assign, or in any manner dispose of such interest; but the rights and interest of any person, for whose benefit the payment of a sum in gross is created, are assignable.[13] Under another provision of the Revised Statutes of thatstate,[14] it is held that the former statutory rule is equally applicable to a trust growing out of *personal property*. In Graff v. Bonnett, 31 N. Y. 13, it is said by Hogeboom, J.: "I am aware that Mr. Justice Cowen, in Kane v. Gott, 24 Wend. 641, and Assistant Vice-Chancellor Sandford, in Grant v. Van Schoonhover, 1 Sandf. Ch. 336, have contended for the contrary doctrine, in arguments of much ingenuity and force; but I think the great preponderance of authority is in the opposite direction, and that the rule has been recognized and acted upon for so long a period, and with such general acquiescence, that it has become a law of property, and ought not to be invaded." This case (Graff v. Bonnett) is regarded as settling "the mooted question of statutory construction, making applicable to trusts of personalty the provision prohibiting alienation of the interest of the beneficiary in trusts of land." Campbell v. Foster, 35 N. Y. 372.[14]

By a statute of Illinois it is provided that, "Whenever an execution shall have been issued against the property of a defendant, on a judgment at law or equity, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a bill in chancery against such defendant, and any other person, to compel the discovery of any property or thing in action, belonging to the defendant, and of any property, money or thing in action, due him, or held in trust for him, and to prevent the transfer of any such property, money, or thing in action, or the payment or delivery thereof to the defendant, except when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. The court shall have power to compel such discovery, and to prevent such transfer, payment or delivery, and to decree satisfaction of the sum remaining due on such judgment, out of any personal property, money or things in action, belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery, whether the same were originally liable to be taken in execution at law or not. Provided that no answer made to any bill filed under this and the preceding section shall be read in evidence against the defendant on the trial of any indictment for fraud charged in the bill."[15] In Michigan: "Whenever an execution against the property of a defendant shall have been issued on a judgment at law, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a bill in chancery against such defendant, and any other person, to compel the discovery of any property, or things in action, belonging to the defendant, or held in trust for him, and to prevent the transfer of any such property, money or things in action, or the payment or delivery thereof to the defendant, except where such trust has been created by, or the fund so held in trust has proceeded

(11.) Bramhall v. Ferris, 14 N. Y. 45; Campbell v. Foster, 35 N. Y. 365. See Hadden v. Spader, 20 Johns. 554; Donavan v. Fink, Hopk. 59; Pettel v. Chandler, 3 Wend. 621.

(13.) Graff v. Bonnett ,31 N. Y. 9; Campbell v. Foster, 37 N. Y. 370, 371; Hawley v. James, 16 Wend. 118, 165.

(13.) 1 R. S. 730, § 63.

(14.) 1 R. S. 773, §§ 1, 2.

(14.) See, also, the following cases, supporting the same view: Hallett v. Thompson, 5 Paige, 583; Gott v. Cook, 7 Paige, 531; Clute v. Bool, 8 Paige, 83; Howe v. Van Schack, 7 Paige, 222; Degran v. Clason, 11 Paige, 135.

(15.) Rev. Stat. Ill., 1877, chap. 22, § 49.

from, some person other than the defendant.[16]

(16.) Compiled Laws, Mich., 1871, Vol. 2, p. 1534, § 24.

NEWSPAPER—LIBEL— PUBLIC OFFICERS—PRIVILEGE.

FOSTER v. SCRIPPS.

Supreme Court of Michigan.—October Term, 1878.

HON. J. V. CAMPBELL, Chief Justice.
" ISAAC MARSTON, } Associate Justices.
" B. F. GRAVES, }
" T. M. COOLEY, }

1. LIBEL—NEWSPAPER NOT PRIVILEGED.—A newspaper is never exempt from liability where other publications of libel would not be excused.

2. ATTACKS ON PUBLIC OFFICERS. — Persons in public employment are subject to the fullest criticism for their conduct in which the public is interested, but are not to be falsely traduced.

3. NON-ELECTIVE OFFICER—ONLY COMPLAINT TO PROPER AUTHORITIES PRIVILEGED.—Where an officer is not elected by the public but appointed by the municipal government, *e. g.*, a city or district physician, no libel against him is privileged except a *bona fide* representation made without malice to the proper authority complaining on reasonable grounds.

4. LIBEL AGAINST CITY PHYSICIAN.—A newspaper article charging a city physician with causing the death of a patient by introducing scarlet fever into his system during vaccination, *is libelous and not privileged.*

This was an action of libel, brought against the proprietor of the Detroit *Evening News*, for publishing in that paper an article charging plaintiff with causing the death of an infant child, by introducing scarlet fever into its system during the operation of vaccination, which operation was alleged to have been performed by the use of the trochar. The case was tried in the superior court of Detroit, and there the utterance was held to be privileged because plaintiff was a city physician.

CAMPBELL, C.J., after stating the facts of the case, said:

That the article, if not privileged, was libelous is beyond question. The authorities on the non-actionable character of spoken words have no necessary bearing on the character of written or printed libels. The doctrine is elementary that written articles which in any way tend to bring ridicule, contempt, or censure on a person are libelous, and are actionable unless true or privileged. This article not only traced the death of one person and the sickness of another to plaintiff, but laid the blame on his willful misconduct upon sordid motives. It was not claimed on the trial, and the plea disclaims the truth of the principal charge that the trochar was used—whether its use was or was not improper.

We are, therefore, not required to discuss the somewhat extraordinary proposition that the city Board of Health are authorized to determine *ex cathedra* the methods of medical treatment.

The question is simply whether such false and damaging charges as have a necessary tendency to ruin the reputation and business of a medical man, may be made without responsibility to legal redress, simply because he happens to be a city physician.

It is not and cannot be claimed that there is any privilege in journalism which would excuse a newspaper when any other publication of libels would not be excused. Whatever functions the journalist performs are assumed and laid down at his will, and performed under the same responsibility attaching to all other persons. The greater extent of circulation makes his libels more damaging, and imposes special duties as to care to prevent the risk of such mischief, proportioned to the peril. But whatever may be the measure of damages, there is no difference in liability to suit.

Allowing the most liberal rule as to the liability of persons in public employment to criticism for their conduct in which the public are interested, there certainly has never been any rule which subjected persons public or private to be falsely traduced. The nearest approach to this license is where the person vilified presents himself before the body of the public as a candidate for an elective office, or addresses the public in open public meetings for public purposes. But even in such cases we shall not find support for any doctrine which will subject him without remedy to every species of malevolent attack.

But where a person occupies an office like that of a city or district physician, not elected by the public, but appointed by the council, we have found no authority, and we think there is no reason, for holding any libel privileged except a *bona fide* representation made without malice to the proper authority, complaining on reasonable grounds. The case of Purcell v. Sowles, 1 C. P. D. 781, affirmed on appeal, 2 C. P. D. 215, is a case as nearly like the present one as is often found; and, while the court of appeal—on this point differing from the lower court—held the office of public physician gave the public an interest in having it properly filled, it was held no discussion or publication was privileged of facts charged against him, except when made in the course of a lawful proceeding against him.

The good sense of such a rule can hardly be doubted. Every man's reputation is as sacred as his property. He can not complain when the truth is told. But he can always complain of falsehoods, which are not told in an honest attempt to make him responsible to a proper tribunal, or in some other performance of duty. The publication in such cases puts him in a direct way of having the truth established, and the wrong can not actually be done without furnishing its antidote.

If a medical officer is charged in the public press with professional misconduct, the immediate and necessary effect is to destroy confidence in him, and prevent him from gaining a livelihood by his profession. The readers of the paper have no means of investigation, and may never have. The charge may never reach an investigation, and he

may have no means of compelling one. If he is obliged to put up with such a wrong, the consequence will be monstrous. The law can not recognize any such immunity from responsibility, nor can the rights of individuals be so trifled with.

The case of Dickson v. Hilliard, L. R. 9 Ex. Ch. 79, sums up the cases of privileges very neatly and briefly. In that case, without contemplating any petition, or any other method of examining into the facts, two days after an election, the agent of one of the candidates sent to an agent of the other a document charging plaintiff with bribery. This was held not privileged; and the court, in deciding the point, mentioned the various decisions of privileged communications outside of those which were never questioned, and puts them in three classes. The first includes such cases as Harrison v. Bush, 5 El. & B. 344, where a *bona fide* attempt was made to have a magistrate removed from office by appealing to a person in authority. It was claimed that the application should have been made to the Chancellor instead of to a Secretary of State, but held that, as the Queen herself was the acting power, a communication made to either officer was in effect made to her, and privileged if made in good faith to redress a grievance.

The second class included communications like those made by military officers to courts of inquiry, or to the proper authority, to aid in the prosecution of such inquiry. Dawkins v. Lord Rokeby, L. R. 8 Q. B. 255, affirmed, 7 H. L. 744; 2 Cent. L. J. 491, was such a case.

The third class included those cases in which information was given by one who was under a legal or moral duty to give it to another who had a right to ask it. The most familiar instance of this is in the answering inquiries concerning servants.

But, as it was very well pointed out, there was no right to make untrue and injurious statements concerning others, when they are not made to persons having the right and power to investigate, and in an honest attempt to invoke said investigation or answer such inquiry.

In our opinion the libel in the present case was not privileged, and the plaintiff was improperly deprived of his remedy.

The judgment must be reversed with costs, and a new trial granted.

Marston and Graves, JJ., concurred.

Cooley, J., concurred upon the facts of this particular case.

"LOCAL OPTION" LAW—PROSECUTION—DEFENSE.

YOUNG v. COMMONWEALTH.

Court of Appeals of Kentucky, September, Term, 1878.

Hon. WM. LINDSAY, Chief Justice.
" W. S. PRYOR, } Associate Justices.
" M. H. COFER, }
" J. M. ELLIOTT, }

1. COUNTY COURTS HAVE NO POWER TO GRANT LICENSES TO RETAIL LIQUORS in any given locality after the local option law has gone into effect in that locality, in consequence of a popular vote, and such licenses are void.

2. ON THE TRIAL OF A PROSECUTION FOR VIOLATING THE LOCAL OPTION LAW, it is competent to prove that a majority of the legal voters voting on the question whether liquors shall be sold in any city, town or district did not vote against such sale: but it is not competent to prove by parol evidence that the requisite number of notices were not posted, or that they were not posted the length of time before the election that the act required.

3. WHEN AN ORDER DIRECTING THE ELECTION TO BE HELD AND A CERTIFICATE OF THE RESULT ARE PRODUCED and found in substantial compliance with the requirements of the act, the "local option law" is *prima facie* in force in the city, town or district to which the order and certificate relates, and the only question open for inquiry is whether a majority of the legal votes cast in said election were cast against the sale; and on this issue the burden is on the defendant.

4. WHEN THE LOCAL OPTION LAW TAKES EFFECT in a given locality, it becomes operative as a whole and suspends *pro tanto* all inconsistent laws relating to the same subject, and any one violating that law must be prosecuted and punished under its provisions and not under the provisions of the general laws.

APPEAL from Meade Criminal Court:

D. R. Murray for appellant; Attorney-Genera *Moss* for appellee.

COFER, J., delivered the opinion of the court:

The appellant was indicted in the Meade criminal court in December, 1876, for the offense of keeping a tippling-house "in said county." The indictment was in the usual form, and did not allege at what particular place in the county the alleged offense was committed. The Commonwealth introduced evidence establishing a *prima facie* case, and the appellant read in evidence a license granted to him by the Meade county court, licensing him to keep a tavern at his house in Garnettsville, in said county, with the privilege of retailing liquor therein, covering the time embraced by the indictment and evidence for the prosecution. The Commonwealth then put in evidence, from the order-book of the county court, a certificate of the county judge, county clerk and sheriff of Meade county, certifying that "at an election held in District No. 5, Garnettsville, in said county, on Saturday, the first day of May, 1875, being a general election, and the sense of the qualified voters of said district being taken on the question, 'Are you in favor of the sale of spirituous, vinous or malt liquors, in this district?' upon due comparison and addition, the vote stood thus: For, 116 votes; against, 158 votes." The appellant then introduced and read the order of the county court ordering the election to be held, and offered to prove that only four notices of the election had been posted in the district, and that they were not so posted as much as twenty days before the day of the election. To this evidence the commonwealth objected, and the objection was sustained.

The court instructed the jury in substance—that the license read to them afforded the defendant no protection, and that if he had, between the 20th of

November and the 20th of December, 1876, sold spirituous liquors or wine, or a mixture of either, in a house in Garnettsville, to be drunk in the house where sold, or on premises adjacent thereto, or sold and the same was drunk in the house where sold, or on adjacent premises, they should find him guilty—if he so sold as often as twice—of keeping a tippling-house, and if he sold but once, of retailing merely. The jury returned a verdict of keeping a tippling-house, and the court rendered judgment thereon for $60, the fine prescribed by the General Statutes for that offense. From that judgment this appeal is prosecuted.

The act of the Assembly generally called the "Local Option Law" (Bullitt & Feland's Statutes, 946), provides in sections 1, 2, 3 and 4 for the holding of elections in cities, towns and civil districts on the order of the county court, made pursuant to the petition of not less than twenty legal voters of such city, town or district, for the purpose of taking the sense of the legal voters thereof upon the proposition whether or not spirituous, vinous or malt liquors shall be sold therein; and section 5 provides that if it shall be found that a majority of the legal votes cast at the election provided for in the preceding section were given against the sale of spirituous, vinous or malt liquors, it shall be the duty of the examining board to certify *that fact*, which certificate shall be delivered to the county clerk, and by him safely kept until the next regular term of the county court, at which time the county judge shall have the same spread on the order book of his court, and said entry of the certificate in the order book, or a certificate in the order book or a certified copy thereof, shall be *prima facie* evidence in all prosecutions under said act. Section 6 provides that "after the entry of the certificate of the examining board, as above provided for, in the order book of the county court, it shall be unlawful for any person to sell any spirituous, vinous or malt liquors in said district, town or city to any person, and any person who sells any such liquors in said district, town or city shall, upon conviction, be fined the sum of not less than twenty-five dollars nor more than one hundred dollars for each offense.

The appellant contends that, inasmuch as the general law empowers the county court to grant tavern licenses with the privilege of retailing liquors, and the "local option law" does not declare that no such license shall be granted after it goes into effect in any given locality, a license granted after that event is valid until reversed or annulled by a direct proceeding. The act declares that after the certificate of the board of examiners is entered on the order book of the county court, it shall be unlawful for any person to sell liquors in the district, town or city to which the certificate applies. This language is plain and needs no construction. That which the law denounces as unlawful cannot be made lawful by a license granted by an order of the county court. Such an order is void and cannot afford protection against the penalties denounced by law against those guilty of the forbidden act.

It is also contended that the election and certificate are void if the requirements of the act were not strictly pursued in all matters relating to the election, and, as it is provided that the certificate when entered on the order-book of the county court is *prima facie* evidence, it is competent to introduce parol evidence on the trial of prosecutions for violating the act to show that its provisions were not complied with, and that it therefore never went into effect in consequence of the vote.

The only facts required to be certified by the examining board are that an election was held to take the sense of the qualified voters of the district, town or city, upon the question whether or not spirituous, vinous or malt liquors should be sold therein, and that the majority of the legal votes cast were against such sale. As those are the only facts required to be certified, they are the only facts of which the certificate is any evidence at all.

It would, therefore, be competent to prove that the certificate is untrue in either or both of these respects, but it is not competent to prove by parol evidence that the requisite number of notices were not posted, or that they were not posted the length of time before the election that the act requires. No provision is made for any inquiry into these questions. And when an order of the county court directing the election to be held, and a certificate of the result, are produced and found in substantial compliance with the requirements of the act, the "local option law" is *prima facie* in force in the district, town or city to which the order and certificate relate, and the only question open for inquiry is whether a majority of the legal votes cast in said election, that is for and against the sale of liquors, were cast against such sale. On this issue the burden is on the defendant.

But we are of the opinion that in localities where the act goes into effect, it becomes operative as a whole, and suspends *pro tanto* all inconsistent laws relating to the same subject. Being in force in Precinct No. 5, in Meade county, it at the same time deprived the appellant of the protection his license would otherwise have given him, and relieved him from liability to the penalty denounced by the statute relating to taverns and tippling houses. If he has violated the local option law, he should have been prosecuted and punished under its provisions, and consequently had a right to have the fine against him fixed by the jury at not less than $25 nor more than $100, instead of having it fixed by the court at $60, as prescribed by the general law.

Moreover, as under the indictment in this case the Commonwealth could have proved the keeping of a tippling-house in any part of Meade county, we think the appellant could not be legally convicted under it of an offense which he could only have committed in precinct No. 5.

An indictment under the act should charge the defendant with the offense of selling spirituous, vinous and malt liquors without a license therefor, and contain a statement of the acts done by him which constitute the offense, and of the place where the acts were done, as in civil district No. 5, in Meade county, and that the defendant had no

license authorizing him to so sell. These averments are necessary to notify the defendant of the cause and nature of the execution against him, and to enable him to prepare for his defense and to plead the judgment in bar of a second prosecution.

Being informed by the indictment of the place where the offense is alleged to have been committed, he will be bound to take notice of the law of that place, and it will not be necessary to allege that the act is in force in that place on the facts which show that it is in force. These may be proved on the trial, not as constituent parts of the offense, but as showing that the "local option law" was in force when the acts alleged were committed, and is the law by which he is to be tried.

Judgment reversed and cause remanded for further proper proceedings.

CONTRACT FOR PERSONAL SERVICE— INDEBITATUS ASSUMPSIT—CONTRACT PARTIALLY FULFILLED.

DUNCAN v. BAKER.

Supreme Court of Kansas.

[Filed November 26, 1878.]

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

Where a contract is entire and has been only partially fulfilled, the party in fault may nevertheless recover from the other party for the actual benefit received and retained by the other party, less the damages sustained by the other party by reason of the partial non-fulfillment of the contract; and this may be done in all cases where the other party has received benefit from this partial fulfillment of the contract, whether he has so received the same and retained it from choice or from the necessities of the case. Thus where D hired B to work for him for seven months at $15 per month, and B worked for D only fifty-nine days and then quit without any reasonable excuse therefor: *Held*, that B may nevertheless recover from D for what the work was reasonably worth, less any damage that D may have sustained by reason of the partial non-fulfillment of the contract.

ERROR from Montgomery county:

Ben. M. Armstrong, for plaintiff in error; *George Chandler*, for defendant in error.

VALENTINE, J., delivered the opinion of the court:

This action was commenced in a justice's court by Jeremiah Baker against Solomon Duncan, to recover $48.40 which he claimed to be due for 59 days' work. Judgment was rendered in the justice's court in favor of Baker for $19.90 and costs, and Duncan then appealed to the district court. In the district court judgment was again rendered in favor of Baker for $19.90 and costs and Duncan then brought the case to this court for review.

It would seem from the evidence in the case that Duncan hired Baker to work for him for seven months at $15 per month; that Baker under the contract worked for him for only 59 days and then quit, and (as Duncan claims) without any reasonable excuse therefor; that, during the time that Baker worked for Duncan, Duncan paid Baker $9.60 on his work, and afterwards refused to pay him anything more. Duncan claims that Baker is not entitled to recover anything for his work. And this he does upon the ground that the contract under which Baker did the work was an entire contract, that under such contract there can be *no apportionment*, and therefore, that, as Baker quit work before the time for him to do so under the contract had arrived, and without any reasonable excuse therefor, he cannot now recover for what work he actually did under the contract.

There are many authorities which sustain this claim of the plaintiff in error, Duncan. Indeed nearly all the older authorities do; but we think a majority of the later and better reasoned cases sustain the contrary doctrine.

Mr. Parsons in his work on Contracts, speaking of entire contracts, says: "So, too, if one party without the fault of the other fails to perform his side of the contract in such a manner as to enable him to sue upon it, still if the other party have derived a benefit from the part performed it would be unjust to allow him to retain that without paying anything. The law therefore generally implies a promise on his part to pay such a remuneration as the benefit conferred upon him is reasonably worth; and to recover that *quantum* of remuneration an action of *indebitatus assumpsit* is maintainable." 2 Pars. Cont. 6th. Ed. 523. Many authorities may be found to sustain the foregoing proposition of Mr. Parsons. And authorities may be found to sustain it in all its various aspects. Thus, authorities may be found to sustain it with reference to contracts of sale, contracts to do some specific labor upon real estate as building or repairing houses &c., contracts to do some particular labor upon personal property as making or repairing specific articles of personal property, and contracts for personal services. The leading case which sustains the foregoing proposition with reference to contracts for personal services is the case of Britton v. Turner, 6 N H. 481. That was an action of *indebitatus assumpsit* with a *quantum meruit* count for work and labor performed. The plaintiff had contracted to work for the defendant for one year for the sum of one hundred dollars, but he left the defendant's employment after working for him for only about nine months without the consent of the defendant and without good cause. It was held however that he might recover on the *quantum meruit* count notwithstanding his failure and refusal to work the full time that he had agreed to do. There are other cases directly applicable to the present case, to some of which we shall hereafter refer.

Mr. Field, in his work on Damages, says that "the doctrine now generally recognized in case of part performance of a contract for personal service is, that if the employer accepts the benefit of what has been done, whether voluntarily or from the necessity of the case, the employee may recover according to the contract price, for what has been done;

or where he is to receive a fixed sum for the whole work, then in the proportion which the work done bears to the whole work; or, where there is no price fixed then upon a *quantum meruit*, from which, however, there must be deducted whatever damages may have resulted to the employer from the failure to fully perform the contract by the employee." Field on Damages section 326. Mr. Field also after commenting upon the case of Britton v. Turner *ante*, and speaking of the argument therein contained as being an able one, then says, that "the tendency of the decisions seems to be in harmony with the views thus ably set forth." Section 332. He further says, "The doctrine of Britton v. Turner is also now fully or partially recognized in Michigan, Wisconsin, Indiana, Illinois, Pennsylvania, Maine, Texas, Tennessee, Missouri, New York, and other states. Section 334. "And the doctrine, in view of its manifest justice, is likely to grow in favor until it becomes universally recognized." Section 335.

Mr. Parsons also says, "The case of Britton v. Turner, 6 N. H. 481, resists the whole doctrine of these cases (previously cited by him) and permits the servant to recover on a *quantum meruit*. His right to recover is carefully guarded in this case by principles which seem to protect the master from all wrong, and to require of him only such payment as is justly due for benefits received and retained, and after all reduction for any damage he may have sustained from the breach of the contract. So guarded, it might seem that the principles of this case are better adapted to do adequate justice to both parties, and wrong to neither than those of the numerous cases which rest upon the somewhat technical rule of the entirety of the contract." 2 Parsons on Cont. 6th ed. 38, 39. The following cases are also in point: Pixler v. Nichols, 8 Iowa, 106; McClay v. Hedges, 18 Iowa. 66; McAfferty v. Hale, 24 Iowa, 356; Byerlee v. Mendel, 39 Iowa, 382; Wolf v. Gerr, 43 Iowa, 339.

In the case of McClay v. Hedges *ante*, Judge Dillon, who delivered the opinion of the court, uses the following language: "This question was settled in this state by the case of Pixler v. Nichols, 8 Iowa, 166, which distinctly recognized and expressly followed the case of Britton v. Turner, 6 N. H. 481. That celebrated case has been criticised, doubted and denied to be sound. It is frequently said to be good equity, but bad law. Yet its principles have been gradually winning their way into professional and judicial favor. It is bottomed on justice and is right upon principle, however it may be upon the technical and more illiberal rules of the common law, as found in the older cases." 18 Iowa, 68. See also Hillyard v. Crabtree, 11 Texas, 264; Carroll v. Welsh, 26 Texas, 147, 149; Hollis v. Chapman, 36 Texas 1, 5. In the last case cited the court uses the following language: "But this court, by a succession of decisions, has settled the question of the apportionability of contracts and we are inclined to follow these decisions in this case." (Citing the above and other cases.) In the last case the court says, "The doctrine of the earlier decisions, to the effect that where the contract in cases like the present is entire, the performance by the employee is a condition precedent, and he has no remedy until he has fully performed his part, is not now the recognized doctrine of the courts." See also Lamb v. Brolaski, 38 Mo. 51, 53; Ryan v. Dayton, 25 Conn. 188; Epperly v. Bailey, 3 Ind. 73; see also the numerous cases cited by Mr. Field in his work on Damages, section 334, note 24; and also cases cited in 3 U. S. Digest, first series, page 521, No. 2,390.

The weight of authority at the present time we think is unquestionably against the doctrine that where a contract is entire and consequently not apportionable, and has been only partially performed, the failing party is not entitled to recover or receive anything for what he has actually done. It will perhaps be admitted that such doctrine has been overturned with respect to all contracts except those for personal services; and if so, then there is not much of the doctrine left. But if the doctrine is to be abandoned with reference to all contracts except those for personal services, then why not abandon the doctrine altogether? The reason usually given for not wholly abandoning the doctrine is, that the employer in contracts for personal services has no choice, except to accept, receive and retain the services already performed, while in other contracts he may refuse to accept or may return the proceeds of the partially performed contract if he chooses. But this is not always nor even generally true with respect to other contracts. Suppose a miller purchase a thousand bushels of wheat for a thousand dollars, the wheat to be delivered within one month; he receives the wheat as it is delivered and grinds it into flour; when the vendor has delivered 500 bushels thereof he refuses to deliver any more; what choice has the miller then except to retain what he has already received? This kind of supposition will also apply to the purchase and sale of all other kinds of articles where the purchaser on receiving them changes their character or sells them so that he cannot return them. Or suppose that an owner of real estate employs a man to build or repair some structure thereon for a gross but definite sum, the owner of the real estate to furnish the materials or a portion thereof in case of building, and either party to furnish them in case of reparing, and the job is only half finished, what choice has the owner of the real estate with reference to retaining or returning the proceeds of the workman's labor? This kind of supposition will also apply to all kinds of work done on real estate, and will often apply to work done on personal property. Of course in all cases where the employer can refuse to accept the work, and does refuse to accept it, or returns it, he is not bound to pay for it, unless it exactly corresponds with the contract. But where he receives it and retains it, whether he retains it from choice or from necessity, he is bound to pay for the same what it is reasonably worth, less any damage that he may sustain by reason of the partial non-fulfillment of the contract. Of course he is not bound to pay anything unless the work is worth something, unless he receives or may receive some actual benefit therefrom; and where he receives or may receive some actual benefit therefrom, he is bound to pay for such benefit, and only for such

benefit, within the limitations hereinbefore mentioned.

The judgment of the court below will be affirmed.

All the justices concurring.

EJECTMENT — EVIDENCE — EFFECT OF JUDGMENT IN FORCIBLE ENTRY AND DETAINER ON ACTUAL ADVERSE AND CONSTRUCTIVE POSSESSION OF OCCUPANT UNDER COLOR OF TITLE.

BRADLEY v. WEST.

Supreme Court of Missouri, October Term, 1878.

[Filed December 2, 1878.]

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON, " WARWICK HOUGH, " E. H. NORTON, " JOHN W. HENRY, } Associate Justices.

1. WHERE ONE IN ACTUAL POSSESSION of a part of a tract of land, under color of title to the whole tract, has been turned out of such actual possession and restitution made to the true owner under a judgment of forcible entry and detainer, the effect of such restitution is to restore the possession of the owner from the time of such forcible entry, and the possession of the disseizor will become the possession of such owner for the entire period during which such forcible possession was held by the adverse occupant.

2. A JUDGMENT IN SUCH ACTION OF FORCIBLE ENTRY and detainer is final and conclusive against the adverse occupant that the entry of such occupant was upon the actual possession of the true owner: that such entry was forcible, and that his holding possession was unlawful, and when restitution it made of the part so actually held, the constructive possession which follows claim and color of the unoccupied portion of the tract, is thereby extinguished.

3. EVIDENCE OF PARTY TO PROVE GENUINENESS OF TITLE PAPERS WHERE GRANTOR IS DEAD.—In an action of ejectment against a party holding adverse to the title of the true owner, the plaintiff is a competent witness to prove the execution and genuineness of the deed to himself, although his grantor may be dead at the time of the trial. Such conveyance is not the contract or cause of action at issue and on trial. The cause of action at issue and on trial in such case is the wrongful withholding of lands of plaintiff. Both parties to that cause are living, and the test of competency is *this cause of action* thus at issue and on trial, and not the facts to which either party may be called to testify.

Botsford & Williams for the plaintiff; *Hale, & Eads*, and *Waters, & Winslow*, for the defendant.

HOUGH, J., delivered the opinion of the court;

This was an action of ejectment, instituted March 1st, 1872, to recover possession of a part of the S. E. one-fourth of sec. 15, T. 55, R. 23, the same being military bounty land, in the county of Carroll. The cause was tried at the December term, 1875. The defendant relied upon adverse possession, under color of title for the period of two years, under the special limitation law applicable to such lands. The plaintiff had judgment, and the defendant has appealed.

It appears from the record that the plaintiff and the defendant each had actual possession in April, 1869, of a part of the tract in controversy; the plaintiff of a strip on the west side of said tract, containing about eight acres, and the defendant of a strip on the east side thereof, containing about twelve acres. The intervening portion of the tract remained unoccupied until the summer of 1871, when the defendant took actual possession of a part, and subsequently of the whole tract. On the 22d day of June, 1871, the plaintiff brought an action of forcible entry and detainer against the defendant for the twelve acres occupied by him, and recovered judgment therefor, which judgment was affirmed by this court at its May term, 1875. A writ of restitution was issued on this judgment, and the plaintiff was restored to the possession of said twelve acres, on the 11th day of November, 1875.

The only possession claimed by the defendant, of the land lying between the eight acres on the west, and the twelve acres on the east, prior to the summer of 1871, was a constructive possession thereof, by reason of his alleged occupation of the twelve acres, under color of title, before the plaintiff or any one for him entered upon the western border of the tract. But the verdict of the jury, in the forcible entry and detainer case, is conclusive of the fact that the plaintiff entered upon the western border of the tract before the defendant entered upon the eastern border, and that the latter's entry was a forcible intrusion upon the plaintiff's premises; and when restitution was made under the judgment in that case, the *statu quo* was restored, and the defendant's possession of the twelve acres became, from the beginning, the possession of the plaintiff, and all constructive possession arising out of the actual possession, under color of title, was thereby extinguished. Furgeson v. Bartholemew, 67 Mo. —; 17 Am. Law Reg., N. S. 495. The only adverse possession, therefore, upon which defendant could rely, was the possession taken by him in the summer of 1871, and that was less than two years before the institution of the present suit.

As to the deed from Horton to plaintiff, we are of opinion that the plaintiff was a competent witness to prove that the grantor's name was in the body of the deed, and in the certificate of acknowledgment, at the time such certificate was given by the justice, though Horton, the grantor, was dead.

The deed from Horton to the plaintiff was not the contract or cause of action in issue and on trial. The cause of action in issue and on trial, was the alleged unlawful withholding, by the defendant, of the possession of certain lands from the plaintiff, and both of the parties to this controversy are living. The case does not come, therefore, within the letter of the statute; nor does it come within the reason of the statute, as the representatives of Horton are not parties to this suit, and can not be affected by the result thereof. The validity of the deed from Horton to the plaintiff arises incidentally, and is not directly and necessarily involved in

the issue to be tried. "By the words 'contract or cause of action in issue and on trial,' as used in the statute, the legislature evidently intended such contract or cause of action as was to be enforced by the proceeding; that in regard to which an issue was to be formed and a trial had, where the rights of the parties to the contract or cause of action would be determined by the result." Manufacturers Bank v. Scofield, 39 Vt. 590-594. In Downs v. Belden, 46 Vt. 674, it was held that where A sued B in trover for the conversion of property which A bought of C, who was dead, A was a competent witness in his own behalf, as to his contract of purchase with C. In Granger v. Barrett, 98 Mass. 302, speaking of the cases in which a party may be a witness under a statute like ours, the court said: "His competency must be determined in advance by the nature of the controversy, and the questions in issue. If upon that test he is admitted as a witness in the case, his testimony is competent for all purposes, although it may relate to transactions with a person since deceased, which prove to be involved in, or to affect the matter in dispute."

The case of Looker v. Davis, 47 Mo. 141, is to the same effect. We think the rule enunciated in these cases the correct one. It follows that the plaintiff was a competent witness. In Poe v. Domec, 54 Mo, 119; and Johnson v. Quarles, 46 Mo. 423, the transactions in reference to which testimony was excluded, on the ground that one of the parties thereto was dead, were brought directly in issue by the pleadings. In Angell v. Hester, 64 Mo. 142, a promissory note, made by the defendant, was the contract in issue and on trial, and the defendant was offered to vary his liability thereunder by reason of a transaction had with the other party to said contract, who was dead. We held that he was properly excluded.

We see no error in the record, and the judgment will be affirmed. All concur.

NOTE.—In the previous action in this court, Bradley v. West, 60 Mo. 62, the court, at defendant's request, gave three declarations of law, which are cited in full in Judge Wagner's opinion, in the case on appeal, which made it necessary, before there could be a verdict for complainant, for the court to find that complainant was in the actual visible possession of the land claimed, and that at the time defendant entered, complainant had entered upon the land, that defendant entered upon that possession of the complainant and turned him out, and that such entry was unlawful and wrongful. This matter of prior possession by the respondent in the case at bar on the 26th of April, 1869, having thus been solemnly adjudged in that cause by a competent court upon its merits, it was conclusively settled as between the parties to that action, and the record, judgment and proceedings therein were admissible in the second suit, for the purpose of showing such adjudication. McKnight v. Taylor, 1 Mo 282; Offutt v. John, 8 Mo. 124; Harvie v. Turner, 46 Mo. 444; Ridgely v. Stillwell, 27 Mo. 128; Strong v. Ins. Co., 62 Mo. 295; Wood v. Ensel, 63 Mo. 194; 2 Wharton Ev., § 758, and cases cited. And the bill of exceptions, preserved by appellant in that cause, was admissible to show what facts were in issue and decided. Wharton Ev., § 835, and cases cited. Hickerson v. City of Mexico, 58 Mo. 64.

In Mitchell v. Davis, 23 Cal. 381, the record of proceedings in a forcible entry case, was held admissible to prove the extent and right of plaintiff's possession, and that defendant was estopped from denying the same. In Stean v. Anderson, in trespass, 4 Harr. (Del.) 215, the chief justice, for the court, declares the law to be, that a verdict and judgment in a former action of trespass between the same parties were final and conclusive: 1st, that such trespass was committed by the defendant; and 2d, that plaintiff was in the actual possession of the land, where and at the time when the trespass was committed. 2 Waterman on Trespass, § 1122, p. 568. In Harvie v. Turner, 46 Mo. 444-8, in a forcible entry case, plaintiff, Harvie, having given evidence tending to prove peaceable possession, by himself, in the premises, defendant, Turner, offered in evidence the record of the proceedings and judgment in a prior forcible entry and detainer suit, wherein he was plaintiff, and one Howe was defendant, for the purpose of showing that the point in issue in the pending suit had been adjudicated, and in connection with the record offered to prove that Howe entered and took possession under Harvie's authority and as his tenant, that the action was for the same premises, and that the verdict and judgment therein were rendered upon the same facts and issues, that were involved in the present action. It was held that the record was admissible, and determined that Turner, as a matter of fact within the three years next prior to the institution of that suit, was in peaceable possession of the cabin enclosure, and that his possession was unlawfully invaded by Howe. "These facts can not be litigated over again in a forcible entry and detainer suit between the same parties, although the subsequent suit may embrace premises not included in the first, and to that extent the identity between the two is perfect and indisputable. It would hardly be claimed that Howe could escape the consequences of the first judgment by a mere enlargement of the claim, suing for all that was embraced in the original litigation and something more. If that could be done, judgments could be rendered of no effect, by mere artifice and subtlety." This case is upon "all fours" with the present one, and the fact that the form of the present action was different from the former one, is immaterial. 2 Wharton Ev., § 779, and cases cited, The weight of American authority sustains the principle that a judgment of a court of competent jurisdiction directly upon a particular point is, between the parties, conclusive in relation to such point, though the purpose of the suits be different. Transportation Co. v. Traube, 59 Mo. 362; Spencer v. Dearth, 43 Vt. 98; White v. Coatsworth, 6 N. Y. 138; Freeman on Judgments, § 258, and cases there cited.

2. As to the competency of the respondent as a witness in this case, his grantor being dead.

By the general law respondent was competent, unless he came within the limits of the proviso contained in the Missouri statute: "Provided that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor." 2 Wag. Stat. p. 1372, § 1. By the "contract in issue" is meant the contract in issue and on trial. Morse v. Low, 44 Vt. 561. And by these words, "contract or cause of action in issue," the legislature evidently intended such contract or cause of action as was to be enforced by the proceeding; that in regard to which an issue was to be formed and a trial had, where the rights of the parties to the contract or cause of action would be determined by the result. Manf. Bank v. Schofield, 39 Vt. 594.

In this case there was no *contract* in issue and on trial. The cause of action in issue and on trial was the

right to the possession between Horton's grantee and an intruder, in no way connected with him, not in privity, either in law, blood or estate, but holding and claiming in hostility to the title he conveyed by his deed. It was an action of ejectment for recovery of possession of land of respondent, upon which he wrongfully withheld. That was the "cause of action at issue and on trial," and both parties to this cause were living; and the test of competency was the cause of action thus at issue and on trial, and not the facts to which either party might be called to testify. Looker v. Davis, 47 Mo. 145; Angell v. Hester, 64 Mo. 152, and cases there cited. The doctrine contended for by appellant in this case was that whenever a party to an action against a stranger or wrong doer derives any right or title to the thing in controversy by contract, and his immediate or remote grantor is dead, he then and thereby becomes disqualified to testify as a witness to any fact upon which his title is based, or to sustain the fairness and genuineness of any documentary evidence by which that title is witnessed. This position seems unwarranted by either the language or spirit of the statute removing the disqualifications as witnesses, of parties to civil proceedings, or by any adjudications under it. It will be found upon an examination of the cases decided by this court, some of which are cited in the opinion in the principal case, that the exclusion of a party as a witness has resulted from the contract with the deceased being in issue and on trial, and that the heirs, privies or legal representatives of the deceased, were either parties to the record, or the rights of the estate were involved in the issue, and would be affected by tho result. If the proviso were construed to have the extensive effect contended for, it would operate to exclude the testimony of an opposite party in every case, to any fact whatever, where he derives any right, title or interest from a contract with a person who may be dead at the time of trial, and in which his right, thus acquired, may be contested by any stranger to such contract, or who may be claiming in open hostility both to his own right and that of his dead grantor, on the trial of a cause of action which may have arisen long after the death of such grantor. Isenhour v. Isenhour, 64 N. C. 640.

The case of Downs v. Belden, 46 Vt. 674, decided upon a statute, precisely like our own, is directly opposed to such a construction, and fully in point on the question involved here. That was a case of trover and conversion of personal property in which plaintiff Downs claimed by purchase through one James Belden, deceased, and so testified, to which defendant objected because James Belden, his grantor, was dead. Pierrepont, C. J., delivering the opinion of the court, says: "The defendant insists that the testimony of plaintiff as to purchase of the property in question of James Belden should have been excluded, under section 24, ch. 36, of Gen. Stat., the said James Belden being dead. This is an action in trover to recover the value of the property in question. The cause of action in issue is the unlawful conversion of the property by the defendant. The parties to this cause of action are both living. Hence the case does not come within the letter of the statute, as in Hollister v. Young, 41 Vt. 156. James Belden's estate is in no sense a party to this suit, or in any way interested in or affected by the result, and for that reason the case does not come within the spirit of the statute, or the principle recognized in Fitzsimmons v. Southwick, and Chaney v. Pierce, 38 Vt. 509-15, and that class of cases. The purchase of the property by plaintiff of James Belden was a matter collateral to the cause of action in issue and on trial. It was material and admissible as bearing on the question involved, but it did not constitute the basis of the action or of the defense, and comes clearly within the principle recognized in Bank v. Schofield, 39 Vt. 599; Cole v. Shurtliff, 41 Vt. 311; and Moores, Exr. v. Low, 54 Vt. 561. We think there was no error in admitting this testimony."

NEGLIGENCE — MASTER AND SERVANT— INDEPENDENT CONTRACT.

CARTER v. BERLIN MILLS CO.

Supreme Court of New Hampshire.

1. THE LIABILITY OF A PERSON FOR DAMAGES arising from the negligence or misfeasance of another, in the performance of a lawful contract, is confined, in its application, to the relation of master and servant, or principal and agent, and does not extend to cases of independent contracts not creating those relations, and where the employer does not retain the control over the mode and manner of executing the work under the contract.

2. THE IMMEDIATE EMPLOYER OF THE AGENT or servant who causes the injury is alone responsible for it: to him only the rule *respondeat superior* applies.

Case, to recover damages for injuries to the plaintiff's land, occasioned by flowage. Facts found by referee.

The plaintiff is the owner of lands situated on both sides of Clear Stream, in the town of Errol. Clear Stream, where it divides these lands, is a public highway, for the purpose of driving logs in the season of the year when such business is usually done, and in times of high water. The defendants own timber lands on the stream, above the plaintiff's lands. They also own dams, above the plaintiff's premises, on the stream, built for the purpose of holding back the water, and then letting it out to assist in driving logs down the stream when the ordinary flow of the water is insufficient for that purpose.

In the fall of 1873 the defendants made a contract with J. A. & E. D. Thurston, whereby the Thurstons, for a stipulated price per thousand feet, were to cut from the defendants' timber lands certain large quantities of timber, and deliver the same at the mouth of Clear Stream, where the stream empties into the Androscoggin. The Thurstons were at liberty to use the defendants' dams if they wished to.

In fulfilling their contract, the Thurstons used the defendants' lower dam by shutting the gates at night and opening them in the morning, until the rear of their drive had passed the plaintiff's premises. The referee found that the plaintiff had sustained damage, by an unreasonable use of the stream, through the operation of the defendants' dams by the Thurstons, but that the defendants had nothing to do with cutting, hauling or driving the timber down the stream, nor with occasioning the damage complained of, unless they are liable because of their ownership of the dams and of the land where the timber was cut.

The court ordered judgment for the defendants and the plaintiff excepted.

Aldrich & Parsons and *Shurtleff*, for the plaintiff; *Ray & Drew*, for the defendants.

FOSTER, J., delivered the opinion of the court:

Every person who inflicts an injury through his own negligent or wrongful act is responsible in damages for its consequences. This rule applies to all servants and agents executing the orders or the business of their masters or principals, as well as to the masters themselves; but, as the servants or agents are often persons unable to make compensation to the parties injured by their acts, the law properly holds the master or employer responsible for the act of his servant or agent, whether the work is done by a domestic servant or day-laborer, or by a person who works by the job or piece, and contracts to do work for a specific sum; —provided, always, that the workman is an ordinary laborer, personally engaged in the execution of the work, acting under the control of the master, and not a contractor, exercising an independent employment, and selecting his own servants and workmen for the performance of the work.

The liability of any one other than the person actually doing the act from whence the injury results, proceeds on the maxim *qui facit per alium facit per se*. But, although a person has ordered or directed a particular thing to be done, yet if he does not employ his own servants and workmen to do it, but intrusts the execution of the work to a person who exercises an independent employment, and has the immediate dominion and control over the workmen engaged in the work, he is not responsible for injuries done to third persons from the negligent execution of the work, unless a nuisance is thereby created and continued on his own premises. Addison on Torts (4th Eng. ed.) 411-413.

The maxim, *respondeat superior*, depends on the presumed control implied by the relation between the parties. It therefore does not extend to the case of an independent contractor, to whom the execution of a work is committed without any control or power of direction being reserved on the part of the employer as to the manner of executing the work. In such cases the law makes the contractor alone responsible for damage done by him in the execution of the work, the maxim *respondeat superior* applying only to the contractor, for the acts of his servants. But the rule which thus exempts the employer does not apply to cases where the injurious act is the very act which the contractor was employed to do, or a necessary consequence of the work committed to him. Campbell on Negligence, § 75. Moreover, if the contractor personally interferes and gives directions to the sub-contractor, or to the workmen employed by him, he will be responsible for the orders given; but he cannot be charged simply on the ground of his filling the character of the contractor. Addison on Torts (4th Eng. ed.) 415.

These general principles are illustrated by very numerous cases in the courts on both sides of the Atlantic. We need refer to but a few of them.

In Overton v. Freeman, 11 C. B. 867, the defendants had contracted to pave certain portions of the parish of St. Pancras, and entered into a sub-contract with one Warren to pave the street in question. Warren employed laborers to work under him; and certain curbstones were so placed in the pathway by these men as to obstruct the same, "and to constitute a public nuisance," in consequence of which the plaintiff fell over them and sustained an injury. *Held*, that Warren was responsible, and not the defendants. Maule, J., said, "The relation of master and servant has no existence in a case like this. * * I think the present case falls within the principle of those authorities which have decided that the sub-contractor, and not the person with whom he contracts, is liable, civilly as well as criminally, for any wrong done by himself or his servants in the execution of the work contracted for." Cresswell, J., concurring said, "If the act contracted to be done would itself have been a public nuisance, of course the defendants would have been responsible; but the circumstance of the materials being supplied by the defendants and brought to the spot in their carts, makes no difference"—citing Knight v. Fox, 5 Exch. 721. See, also, Reedie v. The London & Northwestern Railway Co., 4 Exch. 244; Peachey v. Rowland, 13 C. B. 182; Steel v. The Southeastern Railway Co., 16 C. B. 550; Serandat v. Saisse, L. R., 1 C. P. 152 (affirming the judgment of the supreme court at Mauritius, on appeal to the privy council), whereby it appears that the French law, in its application of the maxim *respondeat superior*, is in harmony with the English law, the Code Napoleon providing,—"Les maitres et commettants sont responsables du dommage cause par leur domestiques et preposes dans les fonctions auxqueiles ils les ont employes." In their interpretation of the article, the French lawyers appear to have qualified the doctrine so far as regards the *commettant* and *prepose*, by saying that to make *commettant* responsible for the negligence of the *prepose*, the latter must be acting "sous les ordres, sous la direction et la surveillance du commettant."

The general principles applicable to cases of this character, as declared in the cases already referred to, are very clearly recognized by the American courts and jurists.

Mr. Chief Justice Bigelow has suggested the distinction upon which, according to his understanding, all the cases turn: "If the person employed to do the work carries on an independent employment, and acts in pursuance of a contract with his employer, by which he has agreed to do the work on certain specific terms, in a particular manner, and for a stipulated price, then the employer is not liable; the relation of master and servant does not subsist between the parties, but only that of contractor and contractee. The power of directing and controlling the work is parted with by the employer and given to the contractor. But, on the other hand, if work is done under a *general employment*, and is to be performed for a reasonable compensation, or for a stipulated price, the employer remains liable, because he retains the right and power of directing and controlling the time and manner of executing the work, or of refraining from doing it if he deems it necessary or expedient." Brackett v. Lubke, 4 Allen, 138.

The Supreme Court of Michigan have undertaken to lay down some specific rules for the application of the maxim. It applies they say—"1. Where the relation of master and servant, in its most familiar signification, exists. 2. Where the *superior* is in posession of fixed property (as real estate), upon which some service is to be performed; for in such cases the use of the property is confined by law to himself, and he should take care that that use and management works no injury to others. 3. Where, although a special contract be entered into respecting personal property, or services, which does not create the relation of master and servant, as more familiarly understood, yet the principal retains a supervising power over the execution of the contract, and the actual and constructive possession of the property remains in him." "It does not apply," they say, "to those cases where—1. Property is entrusted to the care and management of those who are not the servants of the owner, but who exercise employments on their own account, with respect to the care and management of the goods and property of any person who may choose to entrust them to them, to be dealt with according to that employment. 2. Where a contract is made with another in respect of services upon property, when no power of direction or supervision is reserved by the principal, but the entire discretion as to the mode of execution of the contract, together with control of the property, is confined to the employee. 3. In case of a like contract, the contract prescribing the mode of its execution, where possession of the property is surrendered to the employee to enable him to execute such contract. 4. Where the relation of principal contractor and sub-contractor exists, in relation to works of public improvement, conducted under a public grant, where, from considerations of public policy, and the very nature of the employment, each subcontractor is regarded as a principal, pursuing an independant calling, and responsible for the acts of those in his immediate employment." Moore v. Sanborne, 2 Mich. 519, 529.

The facts of the case last cited were very similar to those under our present consideration. It was a case of injury to the plaintiff, resulting from jams of logs occasioned by the obstruction of Pine river, a public highway. The defendants made a bargain with their employees to cut all the logs the defendants had on certain lands, and to deliver them to the defendants at the mouth of the river—the defendants having no interest in the running of the logs until they reached the point of delivery, nor rendering any assistance, pecuniary or otherwise, in the cutting or running of the logs. It was considered that the relation of master and servant did not exist, and that the employee alone was liable for any injury occasioned to others in performance of his contract.

The only distinction between that case and the present seems to be that, in the former it does not appear whether or not the dams of the defendant were used in the running of the logs.

In Cincinnati v. Stone, 5 Ohio St. 38, it was declared that the principle of *respondeat superior* does not apply to cases of independent contracts not creating the relation of principal and agent, and where the employer does not retain the control over the mode and manner of the performance of the work under the contract. To the same effect is Gwathney v. The Little Miami Railroad Co., 12 Ohio St. 92. In Corbin v. The American Mills, 27 Conn. 274, it is said: To render the employer liable, "the employee must be acting at the time strictly in the place of the employer, in accordance with and representing the employer's will and not his own; and the business must be strictly that of the employer, and not in any respect the employee's." In Eaton v. European & North American Railway Co., 59 Me. 52, Appleton, C. J., said: "When the contract is to do an act in itself lawful, it is presumed it is to be done in a lawful manner. * * * If the injury was the natural result of the work contracted to be done, and it could not be accomplished without causing the injury, the person contracting for doing it would be held responsible." In Pawlet v. The Rutland & Washington Railroad Co., 28 Vt. 297, it was said: "Though it may be assumed that a public nuisance had been committed by the servants of the sub-contractors, and a particular injury has resulted therefrom to the plaintiffs, and for which the town [of Pawlet] had been compelled to make satisfaction, yet we can not discover any privity existing between the defendants and the employees of the sub-contractor. The contract was for a lawful purpose, and in no way involved the commission of a wrong, and the employees of the sub-contractor were not the servants of the defendants, nor under their control." To the same effect is Clark v. The Vt. & Canada Railroad Co., 28 Vt. 103.

In Schular v. The Hudson River Railroad Co., 38 Barb. 653, where D. & M. had an absolute contract with the defendants to draw the defendants' cars over a certain portion of the road, to furnish the horses and drivers for that purpose, and to assume the entire control of the work, it was held that the defendants were not liable for the negligent acts of the servants of D. & M., and that the right of the defendants to control the contractor, or to terminate the contract if the work was not done to the satisfaction of the defendants, does not alter the liability, according to the decision of the court of appeals in Pack v. The Mayor, &c., of N. Y., 8 N. Y. 222. The fact, that the right to use an instrument not in its nature dangerous (as, in the case before us, the defendant's dams) was given, under a contract by which it is to be used in performing work for the owner upon his premises, does not change the liability. King v. N. Y. C. & H. R. R. Co., 66 N. Y. 181. See, also, Kelly v. Mayor, &c., of N. Y., 11 N. Y. 432; Blake v. Ferris, 5 N. Y. 48; Slater v. Merserean, 64 N. Y. 138; Callahan v. B. & M. River R. R., 23 Iowa 564; Cuff v. Newark & N. Y. R. R. Co., 6 Vroom 17; Scammon v. Chicago, 25 Ill. 424; The Prairie, &c., Co. v. Doig, 70 Ill. 52; Hale v. Johnson, 80 Ill. 185; Painter v. Mayor, &c., of Pittsburgh, 10 Wright 213; Wray vs Evans, 80 Pa. 102; Sherman & Redfield on Negligence (2d ed.) Sec. 81; Hilliard v. Richardson, 3 Gray 352.

In Lowell v. B. & L. Railroad, 23 Pick. 24, cited

by the plaintiff, an accident occurred through the negligence of a servant of a contractor employed by the defendants to build a portion of their railroad, and the court sustained the plaintiff's claim on the authority of Bush v. Steinman, 1 Bos. & Pul. 404, which was declared to be "fully sustained by the authorities, and by well established principles,"—although (says Judge Thomas, in Hilliard v. Richardson) the decision of Lowell v. The Railroad did not involve the correctness of the ruling in Bush v. Steinman. At considerable length, Judge Thomas considers the case of Bush v. Steinman, and the authorities upon which that case was based, and declares, as other courts pretty generally have since declared, that Bush v. Steinman does not stand well upon authority or reason, and is no longer revered in Westminster Hall,—is no longer law in England. "If ever a case can be said to have been overruled, directly and indirectly, by reasoning and by authority, this has been." Thomas, J., in Hilliard v. Richardson, 3 Gray 349, 363. See Wright v. Holbrook, 52 N. H. 120. In Lowell v. The Railroad, the accident occurred from the negligence of a servant of the corporation, acting under their express orders. The case stands perfectly well upon its own principles, but is not applicable to the case before us. So, too, the case of Darmstaetter v. Moynahan, 27 Mich. 188, cited by the plaintiff, if applicable at all, does not sustain the plaintiff's argument. The case expressly finds that "the work was done *by himself* (the defendant) by means of Kehl, *who was his instrument*." "The arrangement neither implied nor contemplated that Kehl should be master of the possession." The defendant there employed Kehl to fill the ice-house, and an injury was sustained by Kehl's unlawfully and unnecessarily incumbering the street with the blocks of ice. The decision is governed by the rules applying to agency. Of the same character are the cases of The Chicago, St. Paul & Fond du Lac R. R. v. McCarthy, 20 Ill. 388, and Detroit v. Corey, 9 Mich. 165.

Carman v. The Railroad, 4 Ohio 399, also cited by the plaintiff, holds, that before a case can be made for the application of the principle of *respondeat superior*, not only the relation of master and servant must have existed, but it must appear that the servant, while engaged in the business of the master, has done some act or omitted some duty, neither directed nor authorized by the master, to the injury of a third person. And McCamus v. The Gas-Light Co., 40 Barb. 380, in which the defendant was charged, "goes upon the principle," says the court, "of *qui facit per alium, facit per se*, from which the rule of *respondeat superior* arises; but this rule does not apply, and the liability does not exist, where it can be shown that those engaged in executing the work, and by whose carelessness or want of skill the injury was occasioned, are not the servants or subordinates of him for whose benefit the work is being performed, but are acting under a contract or employment which leaves the contractor or employee free to exercise his own judgment as to the means and assistants to be employed in accomplishing the work, without being subject to control in these respects by the party for whom the work is being done."

If the decision in Stone v. The Cheshire Railroad, 19 N. H. 427, adopts the overruled doctrine of Bush v. Steinman, to that extent it is no longer law in this state. Wright v. Holbrook, 52 N. H. 120. But Stone v. The Railroad required no support from the doctrine of Bush v. Steinman, because, although the injury in Stone v. The Railroad was occasioned by the servants of the sub-contractors, yet Tilton, the chief engineer of the company, "had the general supervision of work done upon the road; he and the engineers under him laid out the work, and saw that it was done according to the contract; and if they found anything going wrong, they attended to it, and had it corrected;" and, says Judge Gilchrist (p. 441), there was no "independent employment exercised by the contractors."

The Thurstons exercised a purely independent employment. There was no privity between the defendants and the Thurstons. Pawlet v. The Railroad, before cited. The circumstance of the dams being furnished by the defendants makes no difference. They were not *per se* a nuisance. Overton v. Freeman, *ante;* and it by no means follows that because the dams were capable of being so used as to constitute a nuisance, or were capable of an improper, a negligent, or a mischievous use, therefore an injury to the plaintiff was a necessary or a natural consequence of a proper use of the dams, or that the Thurstons might not have fulfilled their contract with the defendants without detriment to the plaintiff, and without any improper management with respect of the dams; much less that the defendants, by giving the Thurstons permission to use the dams, authorized or sanctioned any improper management of them.

The plaintiff's injury was not the natural result of the work contracted to be done. A reasonable use of the dams for proper purposes, and a reasonable use of the stream for the transportation of logs, were lawful; and the authority conferred by the defendants was, to execute the contract by a proper and reasonable use of all its means and appliances. When a contract is to do an act in itself lawful, it is presumed it is to be done in a lawful manner. Eaton v. European & N. A. Railway, before cited.

In the circumstances of this case, the Thurstons may, perhaps, be responsible; but these defendants are not.

Exceptions overruled. Bingham, J., did not sit.

CONSTITUTIONALITY OF FEDERAL LEGISLATION AS TO TRADE-MARKS.

Judge Dyer, by means of ample authorities, demonstrates the fallacy of deducing legislative power from the paragraph of the Constitution relating to authors and inventors. His opinion on that point is clear, well-written and impregnable. (See 7 Cent. L. J. 405; also 7 Cent. L. J. 143, 163.) The courts have settled that doctrine by decisions, the long current of which is unbroken by a ripple, except in the Duwell case. (See 7 Cent. L. J. 81.) Judge Dyer was, therefore, right on that point, and Judge Swing wrong. If the learned

judge in Wisconsin had contented himself with stopping there, this disquisition needed not to be inflicted. It is understood by laymen, as well as lawyers, that in this age of dash, steam, electricity and long calendars, courts decide causes in the light in which they are presented. Pleaders adopt theories, and judges apply the law, accordingly. In the two cases under discussion, a false theory was adopted. If the court had merely dismissed a suit based on a false theory, counsel would have been estopped from complaining. Hence the trouble. After much and satisfactory argument, Judge Dyer approaches a point that evidently had not been considered by counsel. Let us examine something that is much like an *obiter dictum*. He said:

"It may be added, that the constitutionality of the trade-mark statute can not be sustained under the clause which gives to Congress the power to regulate commerce among the several states, or, in my opinion, under any provisions of the Constitution which prescribe the legislative powers to Congress." (7 Cent. L. J. 407.)

Issue is joined thereon. Now for proofs. An able jurist, another federal judge, who has given this subject much attention, has several times passed upon this question. Judge Giles, of Baltimore, Md., in the case of United States against Watson Rider, tried October 7, 1878, on an indictment for counterfeiting a trade-mark, held, as he had done before then, that the statute in question is constitutional. That came up on demurrer. He declined to hear the argument of the prisoner's counsel, saying, substantially, that it was too late a day to assert the contrary; and that the same statute had frequently been drawn in question, not only in the United States Circuit Court, but also in the Supreme Court of the United States, and in all instances it was held to be constitutional. * * * Whence does Congress derive its power to legislate on trade-marks? Answer: Under the paragraph of Article I, to regulate commerce among the several states. As Chief Justice Marshall said, commerce is undoubtedly traffic, but it is something more. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse. In that case and later cases the Supreme Court held that commerce includes navigation, embargoes, and all other necessary incidents of commerce. A trade-mark is an incident of commerce. Its very name implies that. Our treaties and conventions on the subject with foreign nations describe and treat of it as such. So do treaties of European nations with one another. So do statutes of all countries. The statute in question purports to be for the protection of commercial rights, and nothing else. The very existence of a trade-mark depends on commerce. The device— whatever it may be—a seal, a letter, a cipher, a monogram, a fanciful name, in short, any arbitrary symbol, has no legal vitality until affixed to merchandise, and it ceases to exist the instant that it is dissociated therefrom. On the strength of a glance at it, as an index of good faith and fair dealing, goods to the value of millions of dollars change ownership. It applies to all kinds of goods, wares and merchandise; whether steel rails enough to reach across the continent, or a paper of camoric needles; a costly bale of silk, or a spool of thread; a magnificent pianoforte, or a toy whistle; a barrel of flour or an oyster-cracker; a pipe of wine or a pint bottle of the same. They all bear the commercial signature called a trade-mark. The mark is an essential element to the value of merchandise. * * * The framers of the commercial paragraph supposed that they had made it perfectly plain and intelligible, yet men have long glided over its surface without divining its full scope and contents. The language which grants the power as to one description or incident of commerce grants it as to all. The purposes of commerce would be to a great degree defeated if authenticating marks—called by an eminent French political ecomomist "the honorable source of confidence and of commercial prosperity"—could not be fully protected. Justice Johnson said: "Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the subject of commercial regulations." It is difficult to comprehend how commerce can be fully protected, if its inseparable and trusty hand-maiden and symbol, its flag—the trade-mark—is to be left a prey to pirates. * * *

The power "to regulate commerce" is exclusively in Congress, and in its terms unlimited, and includes all means appropriate to the end, and all means that have usually been exerted under the powers. The lack of that power, says the Supreme Court, was one of the principal defects of the confederation, and probably as much as any cause conduced to the establishment of the Constitution. The power to regulate commerce is exclusively in Congress, for the individual states are unknown to foreign nations. Said Chief Justice Marshall: "The genius and character of the whole government seem to be that its action is to be applied to all external concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government." The Leidersdorf case (7 Cent. L. J. 405.) is not one of mere internal commerce. The packages of tobacco that bear the marks, true and simulated, belong to inter-state commerce. If it had been made to appear that the goods were intended exclusively for consumption within the State of Wisconsin, as in case of mineral water dipped from a spring to be quaffed on the spot, or refreshments sold at a bar or an inn, then the case would be different.

In considering the question, whether Congress has any authority to legislate on the subject of trade-marks, it is not irrelevant to refer to treaties and equivalent national acts for trade-mark protection. Equally with itself, the Constitution says that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." By the "Additional Article to the Treaty of Navigation and Commerce," between our country and Russia, of 1832—which article was concluded and signed January 27, 1868—it was provided that, to secure complete and efficient protection, the trade-mark of Russian subjects must be lodged exclusively at our patent office. So also, by the terms of the trade-mark convention of April 16, 1869, with France. And, again, the same, by the "Additional Article to the Treaty of Commerce and Navigation," with Belgium, proclaimed July 30, 1869. The validity of those treaty stipulations has not been disputed. It is an axiom that the powers to make treaties and statutes are commensurate. The subsequent registration act embraces rights guaranteed "by treaty or convention." The act is intended in part to effectuate those treaties. If a treaty is valid, so must be a statute passed in accordance with it. Conceding the proposition that our government can and must protect foreigners in their rights to use their trade-marks, how can beneficent protection to the same extent be denied to our own citizens? A government without power to judicially protect its own incidents of commerce, when it can protect those of strangers and aliens, is an inconceivable anomaly. If the statute is void, so must be the treaties mentioned. The declaration (a treaty by anotuer name) between the United States and Great Britain, proclaimed July 17, 1878, says that it is for the protection of "everything pertaining

to property in trade-marks and trade-labels. It is understood that any person who desires to obtain the aforesaid protection must fulfill the formalities required by the laws of the respective countries." The "formalities" referred to are those that are required by the registration statutes then and now in force in each country. Why was the solemn declaration made?

It was in order to secure the advantages offered through registration. It is a corollary from the foregoing, that, if the statute is unconstitutional, treaties, conventions, and declarations, on the same subject-matter, are mockeries and costly delusions. The preamble to the Constitution declares that it was ordained to "establish justice," and "promote the general welfare." The framers of that instrument no doubt intended the power "to regulate commerce" to be as ample as any other power conferred. * * *

Conclusions: Congress has full power to legislate on the subject of trade-marks. The power is derived from the constitutional authority "to regulate commerce." The registration statute of July 8, 1870 (Revised Statutes, sections 4937-4947), is consequently valid.—WM. HENRY BROWNE, in the *New York Tribune*.

DIGEST OF DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

October Term, 1878.

MISTAKE—REFORMATION OF CONTRACT — INSURANCE POLICY.—This was a suit in equity instituted by the firm of Snell, Taylor & Co., to reform a certain policy of insurance for the sum of $8,000 on 220 bales of cotton. The insurance was effected by one K, a member of the firm. The defendant's agents with knowledge or information, that the cotton was owned by Snell, Taylor & Co., and not by Keith individually, intended to insure, and, by direct statements, induced him to believe that they were giving insurance in his name upon the interest of the firm. He assented to the insurance being so taken in his name, because of the distinct representation and agreement that the interest of the firm in the cotton would be thereby fully protected against loss by fire. But, according to the technical import of the words employed in the policy which the company subsequently issued and delivered, only Keith's interest in the cotton was insured. *Held*, that equity would grant relief by reforming the policy so as to cover the firm interest. "We have before us a contract from which, by mistake, material stipulations have been omitted, whereby the true intent and meaning of the parties are not fully or accurately expressed. There was a definite, concluded agreement as to insurance, which, in point of time, preceded the preparation and delivery of the policy, and this is demonstrated by legal and exact evidence, which removes all doubt as to the sense and understanding of the parties. In the attempt to embody the contract in a written agreement, there has been a mutual mistake, caused chiefly by that contracting party who now seeks to limit the insurance to an interest in the property less than that agreed to be insured. The written agreement did not affect that which the parties intended. That a court of equity can afford relief, in such a case, is, we think, well settled by the authorities. In Simpson v. Vaughn, 2 Atk. 33, Lord Hardwicke said that a mistake was 'a head of equity on which the court always relieves.' In Henkle v. Royal Exchange, 1 Ves. Sr. 318, the bill sought to reform a written policy after loss had actually happened, on the ground that it did not express the intent of the contracting parties. Lord Hardwicke said: No, doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts, so that if reduced to writing contrary to the intent of the parties, on proper proof, would be rectified.' In Gillespie v. Moon, 2 Johns. Ch. 594, Chancellor Kent examined the question both upon principle and authority, and said: 'I have looked into most, if not all of the cases in this branch of equity jurisdiction, and it appears to me established, and on great and essential grounds of justice, that relief can be had against any deed or contract in writing founded in mistake or fraud. The mistake may be shown by parol proof, and the relief granted to the injured party, whether he sets up the mistake, affirmatively by bill, or as a defense.' In the same case he said: 'It appears to be the steady language of the English chancery for the last seventy years, and of all the compilers of the doctrine of the court, that a party may be admitted to show, by parol proof, a mistake, as well as fraud, in the execution of a deed or other writing.' And such is the settled law of this court. Graves v. Boston Mar. Ins. Co., 2 Cr. 443; Insurance Co. v. Wilkenson, 13 Wall. 231; Bradford v. Union Bank, 13 How. 66; Hearne v. Marine Insurance Co., 20 Wall. 490, 496. It would be a serious defect in the jurisdiction of courts of equity if they did not have the power to grant relief against mutual mistakes or fraud in the execution of written instruments. Of course parol proof in all such cases is to be received with great caution, and where the mistake is denied, should never be made the foundation of a decree, variant from the written contract, except it be of the clearest and most satisfactory character. Nor should relief be granted where the party seeking it has unreasonably delayed application for redress, or where the circumstances raise the presumption that he acquiesced in the written agreement, after becoming aware of the mistake. Hence, in Graves v. Boston Mar. Ins. Co., 2 Cranch, 419, this court declined to grant relief against an alleged mistake in the execution of a policy, partly because the plaintiff's agent had possession of the policy long enough to ascertain its contents, and retained it several months before alleging any mistake in its reduction to writing. But no such state of case exists here. The policy in question was retained for Keith by the insurance agents. It was not surrendered to him, and he did not see it until after the loss happened. Immediately upon being advised by his attorney that the policy as written did not cover the interest of the firm in the cotton, but only his individual interest, Keith promptly avowed the mistake, and asked that the policy be corrected in conformity with the original agreement. There was no such acceptance by him of the written policy as would justify the inference that he had waived any rights existing under the original agreement, or had conceded that instrument to be a correct statement of the contract of insurance. It may be said that the mistake made out was a mistake of law, and, therefore, not reformable in equity. It was said in Hunt v. Rousmanier, 1 Pet, 15, to be the general rule that a mistake of law is not a ground for reforming a deed founded on such mistake, and that the exceptions to the rule were not only few in number, but had something peculiar in their character. The chief justice, however, was careful in that case to say that it was not the intention of the court 'to lay down that there may not be cases in which a court of equity will relieve against a plain mistake, arising from ignorance of law.' He said that he had found no case in the books in which it has been decided that a plain and acknowledged mistake in law was beyond the reach of equity. In 1 Story Eq. Jurisprudence, sec. 138, *e* and *f* (Redfield's edition), the author, after stating certain qualifications to be observed in granting relief upon the ground of mistake of law, says that

'the rule that an admitted or clearly established misapprehension of the law does not create a basis for the interference of courts of equity, resting on discretion, and to be exercised only in the most unquestionable and flagrant cases is certainly more in consonance with the best considered and best reasoned cases upon the point, both English and American.' The same author says: 'We trust the principle, that cases may and do occur where courts of equity feel compelled to grant relief, upon the mere ground of the misapprehension of a clear rule of law, which has so long maintained its standing among the fundamental rules of equity jurisprudence, is yet destined to afford the basis of many wise and just decrees, without infringing the general rule that mistake of law is presumptively no sufficient ground of equitable interference.' In the case under consideration the alleged mistake is proven to the entire satisfaction of the court. It is equally clear that the assent of Keith to the insurance being made in his name was superinduced by the representation of the company's agent, that insurance, in that form, would fully protect the interest of the firm in the cotton. Assuming, as we must from the evidence, that this representation was not made with any intention to mislead or entrap the assured, it is, however, evident that Keith relied upon that representation, and, not unreasonably, relied also upon the larger experience and greater knowledge of the insurance agents in all matters concerning the proper mode of consummating, by written agreement, contracts of insurance according to the understanding of the parties. He trusted the insurance agents with the preparation of the written agreement which should correctly express the meaning of the contracting parties. He is not chargeable with negligence because he rested in the belief that the policy would be prepared in conformity with the contract. As soon as he had a reasonable opportunity to consult counsel he discovered the mistake, and insisted upon the rights secured by the original agreement. A court of equity could not deny relief under such circumstances, without enabling the insurance company to obtain an unconscionable advantage through a mistake for which its agents were chiefly responsible. In all such cases, there being no laches on the part of the party in discovering and alleging the mistake, equity will lay hold of any additional circumstances, fully established, which will justify its interposition to prevent marked injustice being done. Wheeler v. Smith, 9 How. 82. In deciding, therefore, as we do, that the complainants are entitled to have the policy reformed in accordance with the original agreement, it is not perceived that we enlarge or depart, in any just sense, from the general and salutary rule that a mere mistake of law, stripped of all other circumstances, constitutes no ground for the reformation of written contracts." *Snell v. Atlantic Fire and Marine Ins. Co.* Appeal from the Circuit Court of the United States for the Northern District of Illinois. Opinion by Mr. Justice HARLAN. Decree reversed.

ABSTRACT OF DECISIONS OF ST. LOUIS COURT OF APPEALS.

[*October Term*, 1878.]

HON. EDWARD A LEWIS, Presiding Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

AGENT—HIRING FOR A YEAR — CUSTOM — EVIDENCE.—1. Admission in the pleadings that plaintiff was hired by defendant as its general agent in St. Louis, and employed by defendant in that capacity for seven months, does not imply that there was a special contract for a year. The time for which he was hired, and the question of the power to discharge, are still open. And, where plaintiff was hired by a special agent with limited powers, the burden is on plaintiff to show the special contract, and the authority of the agent to make it. 2. The issue as to the authority of the special agent to employ general agents for a year could not be affected by testimony as to a custom of employing general agents of insurance companies. Evidence of a custom to employ such agents for one year and more was erroneously admitted against the objections of defendant. 3. The construction of the by-laws of a corporation is for the court, not for the jury. 4. Evidence of a recognition of plaintiff by defendant as its general agent did not tend to prove that he was employed by the year, or for a year. Reversed and remanded. Opinion by HAYDEN, J.—*Boogher v. Maryland Life Ins. Co.*

APPEAL—REHEARING—PRINCIPAL AND SURETY.—1. One of several parties to a suit, though on the same side, may appeal without the concurrence of his coparties. 2. A motion for rehearing may be filed when exceptions to the report of a referee are overruled, and such motion has all the effect of a motion for a new trial in an ordinary case, and suspends the judgment until its decision. 3. Where sureties engaged for the faithful discharge of the duties of a book-keeper of a city bank, and the principal in the bond was employed in the double capacity of book-keeper and teller without the knowledge of the sureties, and whilst thus employed he made false entries in the books of the bank, by which erroneous payments of money made by him as teller were concealed, or in consequence of which they were made and loss accrued to the bank, it is immaterial whether the loss of the bank was caused by the wrong-doing of the employee as book-keeper, or by his wrong-doing as teller. In neither case, can the sureties be held, where it is found as a fact in the case that the offices of book-keeper and teller are quite distinct, and that those of a teller are more responsible, and that, as teller, the employee was afforded opportunities and exposed to temptations to take money of the bank, which, as book-keeper, he would not have had. The change imposed upon the sureties a risk which they did not undertake, and exonerated them from all liability on the bond. 4. To accept a surety known to be acting on a belief that there are no unusual circumstances by which his risk is materially increased, whilst the party thus accepting him knows that there are such circumstances, and withholds the knowledge from the surety, is a legal fraud by which the surety is discharged. Reversed and remanded. Opinion by Bakewell, J. *Home Savings Bank v. Traube.*

FIRE INSURANCE—CONDITION "KEEPING OR STORING."—1. A clause in an insurance policy against "keeping or using camphene, spirit gas, burning fluid, or chemical oils," is not violated by using a burning-fluid not in its nature like camphene or spirit gas. 2. The burthen of proof to show the character of the fluid used, and its similarity to those named in the same clause of the policy, is on the insurance company. 3. Keeping a burning fluid, the use of which is not, by the express terms of the policy prohibited, as a light in moderate quantities, to fill the lamps used on the premises from day to day, is not "keeping or storing" the oil in a sense intended to be prohibited by those terms, nor was it "so using the premises as to increase the risk" within the meaning of the policy. 4. The case being tried, both on the pleadings and evidence, on the theory that there was a violation

of one special clause in a policy, it is too late to contend in the appellate court that there was a violation of other clauses not relied upon at the trial. Affirmed. Opinion by BAKEWELL, J. *Wheeler v. American Cent. Ins. Co.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

October Term, 1878.

[Filed December 2, 1878.]

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
" JOHN W. HENRY, } Judges.

CRIMINAL LAW — RECORD MUST SHOW TWELVE JURORS PRESENT WHEN VERDICT IS RENDERED—INDICTMENT FOR EMBEZZLEMENT—SUFFICIENCY OF AVERMENTS—FACTS TAKING CASE OUT OF STATUTE OF LIMITATIONS SHOULD BE STATED. — In 1876 defendant Myers was indicted under sec. 35, art. 2, ch. 42, Wag. Stat., for embezzleing certain United States bonds, charged to have been received by him as agent of one Zumbro, and was convicted at February Term, 1878, of Newton Circuit Court, to which venue had been awarded. It appears from the record that only eleven jurors were present when the verdict of the jury was received by the court. *Held*, 1. This was a fatal defect, and the judgment must be reversed. State v. Mansfield, 41 Mo. 470. 2. The bonds were described in the indictment as "certain United States five-twenty government bonds, which are valuable securities of the value of five thousand dollars." This is sufficient: a more particular description not being required by the statute. Wag. Stat., 1091, secs. 28, 30. Neither was it necessary to set out in detail the nature and purpose of the agency, the agency and the receipt of the bonds by the defendant in his capacity of agent being distinctly averred. The contract between defendant and owner of the bonds need not be set out, but such contract when proven must establish an agency within the meaning of the statute under which he was indicted, and not an ordinary bailment. 3. It appears from the record that the indictment was found more than three years after commission of offense charged, although the indictment alleges commission of offense within three years. The better practice in such cases is to allege the time of commission of offense, and set forth the facts which avoid the bar of the statutes of limitations as an excuse for not having preferred the indictment sooner, though it has been held that the offense may be alleged to have been committed within the time fixed by the statute, and that the facts which suspend the running of the statute may be proved at the trial. Reversed and remanded. Opinion by HOUGH, J.—*State v. Myers.*

LANDLORD AND TENANT — WORKING LAND OR PASTURING CATTLE FOR AN EQUAL SHARE OF PROFITS DOES NOT MAKE TENANT A COPARTNER WITH LANDLORD.—Plaintiff leased to defendant a farm, and by the contract of renting it was agreed that plaintiff was to furnish money sufficient to purchase stock enough to eat up the grain and produce raised by defendant on said farm, and that when any sale of such stock was made plaintiff was to be refunded the purchase price of same, and the balance was to be divided equally between the parties. The cattle were not to be removed from Caldwell county. Plaintiff furnished the cattle, delivered them to defendant, who fed and took care of same, and threatening to remove and dispose of the cattle, was enjoined by plaintiff from so doing, which injunction was by the trial court on the hearing dissolved and plaintiff's petition dismissed. From this judgment plaintiff appeals, and the main and controlling question in the case was, whether the agreement as above stated entered into between plaintiff and defendant constituted them partners. *Held*, in the recent case of Donnell v. Harshe, 67 Mo. 170, the subject of partnerships and what constituted them was examined at some length as well as numerous authorities referred to, and the court there held that an agreement whereby the tenant was to cultivate the farm of his landlord on shares, the landlord and tenant each defraying one moiety of the expenses attendant on such cultivation, and sharing equally in the profits thereof, did not constitute a partnership. The only difference between that case and the present one is, that here, with money furnished by plaintiff, cattle are purchased to eat the produce raised on the farm. This fact does not distinguish it in principle from the one just cited. A mere participation in profit and loss does not necessarily constitute a partnership. In this case the agreement does not confer on *each* party power to manage the whole business and dispose of the whole property. The property in the cattle remained in plaintiff, and no right to dispose of them was conferred by the contract on defendant, nor to remove them from plaintiff's farm without his consent, and the case falls within the rule announced by Shepley, C. J., in Dwinel v. Stone, 30 Mo. 384. Reversed and remanded. Opinion by SHERWOOD, C. J. —*Musser v. Brink.*

ABSTRACT OF DECISIONS OF SUPREME COURT COMMISSION OF OHIO.

December Term, 1878.

[Filed December 11, 1878.]

HON. W. W. JOHNSON, Chief Judge.
" JOSIAH SCOTT,
" D. T. WRIGHT,
" LUTHER DAY,
" T. Q. ASHBURN, } Judges.

ACTION—LAND CONTRACT—FINAL JUDGMENT.—In an action to recover the balance due on a land contract, and to subject the land to sale for the payment thereof, the defendant, by cross-petition, set up an alleged cloud on the plaintiff's title to the land. The court, on the trial, made an entry, finding that the cloud had been removed; that the plaintiff had deposited with the clerk of the court deeds conveying a clear title; the amount due on the contract; and adjudging the defendant to pay the amount to the clerk within thirty days, and in default thereof that execution issue therefor; and on payment by defendant that the deed be delivered to him. The land was sold, and for the balance remaining due an execution was issued on the judgment and levied on other lands of the defendant, which were claimed by another party under a lien acquired after the rendition of said judgment. *Held*, that the entry so made was a final determination of the rights of the parties to the action, and was, therefore, a judgment within the meaning of section 370 of the code: and, being a final judgment against the debtor for the payment of money, under section 421, became a lien on his lands in the county where it was render-

ed, superior to that subsequently acquired. Judgment reversed. Opinion by DAY, J.—*Linsley v. Logan.*

DEMURRER — JUDICIAL NOTICE OF STATUTES — RAILROADS—PENALTY.—1. A demurrer to a pleading admits only what is well pleaded therein. It does not admit a conclusion of law, unwarranted by the facts on which it is predicated. 2. Courts can not take judicial notice of a private or special statute, unless it be specially pleaded. And in pleading such a statute, or a right derived therefrom, it must, at least, be referred to by its title, and the day of its passage. 3. Special privileges conferred on a railroad company by a private charter, granted under the constitution of 1852, do not so inhere in the road constructed under such charter, as necessarily to pass to any corporation which may have acquired, under subsequent legislation, the right to operate the same. 4. The act of April 25, 1873, amendatory of the 13th section of the act of May 1, 1852 (O. L. v. 70, p. 161). which prohibits any corporation operating a railroad in this state from demanding and receiving for the transportation of passengers more than three cents per mile for a distance of more than eight miles, gives the party aggrieved a right to recover from such corporation a forfeiture of not less than twenty-five dollars for each case of overcharge. Judgment of the court of common pleas affirmed. Opinion by SCOTT, *J.—Pitts., Cin. & St L. R. R. v. Moore.*

BOOK NOTICE.

DIGEST OF THE NEVADA REPORTS, and Sawyer's Circuit Court Reports, with a table of cases Cited, Criticised, Commented upon, Affirmed and Overruled. By THOMAS P. HAWLEY, Chief Justice of the State of Nevada. San Francisco: A. L. Bancroft & Co. 1878.

DIGEST OF THE LAW OF MINES AND MINERALS, and of all controversies incident to the subject-matter of Mining, comprising the cases in the English and American Reports, from the Year Books to the present time. By R. S. MORRISON, of the Colorado Bar. San Francisco: A. L. Bancroft & Co. 1878.

The Nevada digest embraces the decisions of the twelve volumes of the Nevada state reports and the four volumes of Sawyer's United States Court reports. It is, consequently, not a very large work; the cases digested do not number one thousand, and the volume contains less than 450 pages. But it is a necessary result of the growth of decisions in that state, and, while being a work of great necessity in Nevada, will be useful for reference in other states. The Chief Justice of Nevada occupies a high place in that distinguished list of judges who, notwithstanding the work which is demanded of them, and which they so well perform upon the bench, find opportunities to undertake other labors, the benefit of which is shared by the profession.

Mr. Morrison's Digest is much more extensive. Though a not very much larger book than the one which we have just noticed, it is more compact. It embraces all the decisions on the law of mines and minerals, from the earliest time to the present day—fully 2,000 in all. Its plan and arrangement are very satisfactory; the cross references and index assisting the searcher very considerably. The work has been in preparation, we understand, for a long time, and that there has been no hurry in its preparation will be evident to any one who may use it, and is its best encomium. We are satisfied that it will prove a very useful compilation. Both of these digests are published by the well-known publishing-house of the Pacific Coast, whose enterprise is carrying forward the most considerable legal publication of the day—the American Decisions. The volumes are well printed, and are bound in the usual style.

QUERIES AND ANSWERS.

ANSWERS.

No. 80.

[7 Cent. L. J. 460.]

B could not answer that he had property in his possession belonging to A. He was simply indebted to A in the sum A had paid him for the wheat. The sale was not complete. There must have been either delivery or separation, in order to enable A to claim specific property. Young v. Austin, 6 Pick. 280, White v. Wilkins, 5 Taunt. 176; Lester v. East, 49 Ind. 588. *Contra:* Whitehouse v. Frost, 12 East. 614, which is an earlier case declared erroneous. As to the civil law on this question, see Winschard's Pandects, § 390.

I. & C.

No. 82.

(7 Cent. L. J. 480.)

All moneys placed in the hands of a stakeholder must be regarded as deposited in his hands, without consideration, to be repaid on demand to the depositor, or his legally attaching creditor; the share of each depositor is subject to attachment for his debts at any time before it is paid over. Drake on Att., Sec. 520; 12 Metc. 520; 4 Kans. 184.

ATCHISON, KAS. G. E. S.

A stockholder can be summoned as garnishee and judgment can be rendered against him to the extent of the funds in his hands. Wimer v. Pritchartt, 16 Mo. 252.

G.

NOTES.

JUDGE LOWELL, of Massachusetts, has been nominated by the President for United States Circuit Judge of the First Circuit.——The United States Supreme Court will adjourn on the 24th inst., until the first Monday in January.——Pollock on Contracts, an English work of mark, is to be re-published in this country by Robert Clarke & Co., of Cincinnati. The American edition will be edited by G. H. Wald, Esq., one of the contributing editors of this JOURNAL.——Poore's Political Register, a book of authority as a law book for the political student, and a recent publication, contains a statement at once incorrect and inexcusable. Among the list of Chief Justices of the United States, after the name of Salmon P. Chase, appears the following: "George H. Williams, of Oregon, appointed by Grant in 1873, rejected; Caleb Cushing, of Massachusetts, appointed by Grant in 1873, rejected." Now, neither of these were ever Chief Justices; they were never confirmed; they were never even rejected, for their names were withdrawn before action by that body, on account of the unanimous opposition of the country. An apparent precedent for this may be found in the case of John Rutledge, whose name is always given and appears in the reports as the second Chief Justice; but he, though rejected by the Senate, presided at one term of the court, and delivered several opinions.——The London *Law Times* comments on the somewhat curious fact that there should be no statute of limitations as to the time within which proceedings may be taken to set aside a will.